UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDMUND EARL REEVES, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	NO. 22064

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in this Court when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, dated June 5, 1967, in the proceeding entitled Reeves v. Wilson, No. 46657.

A. Proceedings in the state trial court.

On March 26, 1965, appellant was arraigned in the Municipal Court, Bakersfield Judicial District, County of Kern, California, on a complaint charging murder (California Penal Code section 187) and robbery (California Penal Code section 211) (Exhibit 4, pp. 2-3). [1/] Appellant was fully advised of his rights and at the conclusion of the court's admonition appellant requested the appointment of counsel (Exhibit 4, p. 3). The court appointed John Nain, Esq., to represent him in any further proceedings in the municipal court (Exhibit 4, pp. 3-4).

On April 1, 1965, the Grand Jury of Kern County conducted indictment proceedings on the above charges (Exhibit 1, pp. 48-68). Paul Leslie Pugh testified that on March 24, 1965, he was employed as a field gauger for Standard Oil Company (Exhibit 1, p. 57). At approximately 9:00-9:30 a.m. he and Floyd Parsons, another oil field worker, drove in separate cars to the New Hope lease located eighteen miles north of Bakersfield (Exhibit 1, pp. 57-58). Upon arrival Pugh observed a 1959 Ford vehicle near a toolhouse on the lease (Exhibit 1, p. 58). Appellant was outside the car, by the open car trunk, pouring something from a five-gallon can into another can in the trunk of his car (Exhibit 1, p. 58).

Pugh and Parsons parked their cars by the field office

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1. Unless otherwise indicated, exhibit references are to the exhibits admitted into evidence at the evidentiary hearing in the District Court.

and as Pugh started his work he saw Parsons walking in the direction of the Ford (Exhibit 1, p. 58). Shortly thereafter Pugh heard what he thought was Parsons walking up behind him (Exhibit 1, p. 59). Turning around he saw appellant holding a gun (Exhibit 1, p. 59). Appellant told Pugh to raise his hands and Pugh complied (Exhibit 1, p. 59). Parsons was standing about three feet from appellant and already had his hands up (Exhibit 1, p. 59). Pugh said "What do you want?", and appellant responded, "Unload your pockets and throw it on the ground." (Exhibit 1, p. 59). Pugh threw down his wallet containing about $145.00 and some small change; Parsons put down a fifty-cent piece, two dimes and a pocket knife (Exhibit 1, pp. 59-60). Pugh was looking at appellant "right in the eye" (Exhibit 1, p. 65).

Appellant directed the men to "turn around and start walking" (Exhibit 1, p. 60). As the men approached two tanks, Pugh started to go to the right and Parsons started to go to the left (Exhibit 1, p. 60). Appellant, gesturing with his pistol, ordered Pugh to the left with Parsons (Exhibit 1, pp. 60-61). They came to a narrow area under a catwalk and Pugh's and Parsons' bodies touched (Exhibit 1, p. 61). They were now hidden from the roadway (Exhibit 1, p. 61). At this moment the gun reported, firing slowly, and Parson's body lurched hard against Pugh (Exhibit 1, p. 61). Pugh jumped around the tank, took a zig-zag course across the tank area and shielded himself behind a boiler (Exhibit 1, pp. 61-62). Pugh then ran towards the road and, as he looked over his shoulder toward the tank area,

appellant fired twice at him (Exhibit 1, p. 62). Pugh hid in a clump of brush (Exhibit 1, p. 62).

Pugh watched appellant as he slowly walked back to the place where the men had been forced to put down their belongings and placed these items in his pocket (Exhibit 1, p. 62). Appel- then rushed back to the Ford and drove off (Exhibit 1, pp. 62-63).

Pugh found Parson's lifeless body by the tanks (Exhibit 1, pp. 63-64). He drove some six miles to the nearest phone and called the authorities who were on the scene in approximately fifteen minutes (Exhibit 1, p. 64).

Dr. Robert W. Huntington, a pathologist, testified that there were three bullet tracks through Parson's body, one entering Parsons' back (Exhibit 1, p. 52). The cause of death was a bullet wound of the heart (Exhibit 1, p. 56).

Appellant was indicted on charges of murder and robbery (Exhibit 2, pp. 2-3). He was arraigned in the Superior Court of Kern County on April 2, 1965 (Exhibit 1, p. 1). James Meeks, Esq., was appointed to represent him and the matter was continued until April 6 (Exhibit 1, p. 1).

On April 6 appellant appeared in court with Mr. Meeks who advised the court as follows (Exhibit 1, p. 3):

> "MR. MEEKS: Step up. Your Honor, I conferred with the defendant and also Mr. Leddy of the District Attorney's office, and I believe if it is possible, I would like a little more time on this matter. Mr. Nelson [the District Attorney] seems to be out of town on business and I would like to talk with him some more, that is, talk with him regarding this matter."

The court continued the matter until April 13 and appellant expressly concurred in the continuance (Exhibit 1, p. 3).

Appellant and Mr. Meeks appeared on April 13 and Mr. Meeks informed the court that Mr. Nelson, the District Attorney, was still out of town and that he had not been able to confer with him (Exhibit 1, p. 4). With the express approval of appellant, the matter was continued until April 28 (Exhibit 1, p. 4).

Mr. Meeks was ill on April 28 and the matter was continued to May 5 with appellant's consent (Exhibit 1, p. 5).

On May 5 appellant was ready to enter his plea and the following occurred after the reading of the indictment (Exhibit 1, pp. 8-9):

> "MR. MEEKS: To all of which the defendant, Mr. Reeves, enters a plea of not guilty by reason of insanity.
>
> "THE COURT: You enter that plea as to both counts?
>
> "MR. MEEKS: As to both counts. For the record, if the Court please, I have explained to Mr. Reeves that the Court will appoint psychiatrists to examine him and if the findings of the psychiatrists is that he is sane at the time of the commission of the offenses and also presently that a plea of guilty automatically comes into being. Is that a correct statement?
>
> "THE DEFENDANT: It is.
>
> "MR. MEEKS: And you understand that?
>
> "THE COURT: Mr. Meeks has fully explained your rights in this case, is that true?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: And you understand the nature of this plea as Mr. Meeks has just entered it in your behalf?

"THE DEFENDANT: Yes.

"THE COURT: And you concur with that plea?

"THE DEFENDANT: Yes.

"MR. MEEKS: Your Honor, could we have three psychiatrists appointed in this matter?

"THE COURT: Yes, before I do that, will you waive the informing the defendant of his rights in this matter?

"MR. MEEKS: I will so waive, for the record, your Honor.

"THE COURT: Mr. Reeves, will you waive the court's informing you of your rights in this matter?

"THE DEFENDANT: Yes, your Honor."

Three psychiatrists were then appointed: Dr. Matychowiak, Dr. Einstein and Dr. Finch (Exhibit 1, pp. 9-10). Mr. Meeks indicated his satisfaction with the doctors appointed and the matter was continued until May 27 (Exhibit 1, p. 10).

Appellant was examined by Dr. Matychowiak on May 14 and in conjunction with the examination gave an account of the killing (Exhibit 2, p. 16). According to the doctor's report, appellant said he was getting some gas when the victim came around the car with a stick in his hand. Appellant pulled a gun from the glove compartment and the victim dropped the stick. He had the victim and the other man empty their pockets so that he could get their car keys and prevent them from following him. Initially appellant told the doctor that the victim jumped him and he shot him. Then he told the doctor that he "felt the guy was going to leap at him, and so he shot him." He admitted to the doctor that he picked up the wallet (Exhibit 2, pp. 16-17).

Dr. Einstein examined appellant on May 24 (Exhibit 2, p. 11). Appellant told the doctor that his difficulties occurred when he was surprised by two workers while he was stealing gas on an oil lease. He had a gun in the glove compartment with which he subdued the two men, took the purse of one of them and attempted to march them into the woods so he could make an escape. When one of the men ran away and the other attempted to attack him he shot the latter "essentially as self-defense" (Exhibit 2, pp. 11-12).

Appellant was examined by Dr. Finch on May 12 (Exhibit 2, pp. 13-15). He related to Dr. Finch that he was stealing gasoline and the victim picked up a club and started toward him, whereupon appellant got his pistol to scare off the victim. He wanted to get the car keys to prevent the men from following him. However, when the victim advanced again with the club, he became frightened, panicked and fired in self-defense (Exhibit 2, p. 15).

The three doctors concluded that appellant was sane. Dr. Finch's report contained the following observation: "His thought content centered chiefly about his present situation, his trial and his hopes for a life sentence" (Exhibit 2, p. 15).

Appellant and Mr. Meeks appeared in superior court on May 27. The following occurred (Exhibit 1, pp. 12-13):

> "MR. MEEKS: Yes, Your Honor, I have read the three doctors' reports and their finding is, they all concur in the finding that the defendant Edmund Reeves is sane at the present time and was sane at the time of commission of the offense.

"THE COURT: All right, in view of --

"MR. MEEKS: I will stipulate with Mr. Nelson, the District Attorney, that the reports be submitted rather than to put on any further evidence as to the sanity of the defendant. Is that all right with you, Mr. Reeves?

"THE DEFENDANT: Yes.

"THE COURT: Is that all right with you?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand what Mr. Meeks is saying?

"THE DEFENDANT: Yeh.

"MR. NELSON: We will so stipulate then, your Honor.

"THE COURT: All right, what do you want to do about a jury trial on this plea?

"MR. MEEKS: You mean on the issue of sanity? We will waive the jury and submit it on the doctors' reports.

"THE COURT: Do you also waive the jury, Mr. Reeves?

"THE DEFENDANT: Yes.

"THE COURT: All right. Do you waive the jury, Mr. Nelson?

"MR. NELSON: We will so stipulate, your Honor.

"THE COURT: The Court has also read and considered the report of Dr. Hans Einstein, and Dr. Charles S. Finch, Jr., from Atascadero State Hospital and the report of Dr. F. A. Matychowiak. After considering these reports, the Court hereby determines that the defendant Edmund Earl Reeves was sane at the time of commission of the offenses and is sane now."

Mr. Meeks then advised the court that he had discussed with appellant a stipulation that the degree of the murder was

first degree based on the California felony-murder rule, but that he wanted to ask appellant again if he wished to so stipulate (Exhibit 1, p. 13). Appellant said he understood the felony-murder rule (Exhibit 1, p. 14). He indicated to Mr. Meeks that he desired a hearing on the degree and Mr. Meeks so advised the court (Exhibit 1, p. 14). Appellant expressly waived jury trial on the issues of degree and penalty (Exhibit 1, pp. 14-15). The matter was continued until June 9 (Exhibit 1, pp. 15-16). On June 9 the matter was put over to June 11 by stipulation (Exhibit 2, p. 19).

On June 11 the court convened for the purpose of the hearing on degree and penalty (Exhibit 1, p. 17). Appellant having pled guilty to murder and robbery, Mr. Meeks stipulated with the District Attorney that the degree was first degree (Exhibit 1, pp. 17-18). Appellant expressly concurred in the stipulation (Exhibit 1, p. 18). It was further stipulated that the trial court could determine the penalty from the transcript of the grand jury proceedings [Exhibit 1, pp. 46-69] and appellant's prior conviction record [2/] (Exhibit 1, pp. 17-19). The court questioned appellant as follows (Exhibit 1, p. 19):

> "THE COURT: Mr. Reeves, will you concur in your counsel's stipulation that I may read and consider this transcript of the grand jury proceeding in your case and consider the same and among other, any

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2. This document, the so-called "rap sheet", was not an item of evidence at the evidentiary hearing in the District Court. However, respondent provided the District Court with a copy of the document on March 10, 1967, in conjunction with the filing of the return to order to show cause.

other items that are introduced, including the record of prior convictions in fixing the penalty in this matter?

"THE DEFENDANT: Yes, your Honor."

The court then continued the matter until June 23 for argument on penalty (Exhibit 1, pp. 19-20).

On June 23, prior to argument, it was stipulated that the robbery was in the second degree. Mr. Meeks again explained to appellant the felony-murder doctrine (Exhibit 1, p. 23):

"MR. MEEKS: As Mr. Nelson has pointed out, at this stage of the proceeding, we have stipulated that it is homicide of the first degree, and homicide in the commission of a robbery, by operation of law and as he said, actually the degree of the robbery, except for the possibility of a consecutive sentence is really immaterial.

"THE COURT: Mr. Reeves, will you join in that stipulation that it be fixed at robbery in the second degree?

"THE DEFENDANT: Yes.

"THE COURT: It is the lesser of the two degrees.

"THE DEFENDANT: Yes, your Honor"

Appellant again personally joined in a stipulation that the court could consider the record of his prior convictions (Exhibit 1, p. 29).

After the District Attorney argued to the court, Mr. Meeks made his argument (Exhibit 1, p. 34). He told the court how deeply he felt the responsibility for a man's life in such a case, having previously served in five other capital cases. He informed the court that appellant had told him on five different occasions that the victim had jumped him with a club. Mr.

Meeks said that from talking to appellant he believed that appellant acted out fear, and he suggested several possible stimulants of that fear (Exhibit 1, pp. 34-35). Mr. Meeks continued (Exhibit 1, p. 35):

> "The man stands ready and has thrown himself on the mercy of the court to pay the penalty, to adjust to society, in the commission of this offense, we have admitted openly and voluntarily, and as I say, Mr. Reeves has cooperated at all stages of the proceeding and he knows he has done the wrong thing but I am of the feeling that there had to have been some provocation. A man doesn't walk up to complete stranger he has never seen in his life and shoot him. There had to be some provocation. There had to be some motive, motivating impulse, and I think that impulse was fear."

After argument the court took the issue of penalty under submission. On June 30, the court imposed the penalty of death (Exhibit 1, p. 40-41).

B. Proceedings in the state appellate court.

Appellant's appeal to the California Supreme Court was automatic. [3/] Prior to submission of the cause, the California Supreme Court remanded the matter to the superior court for a hearing on a transcript correction (Exhibit 3). The case was submitted on the corrected transcript and on June 10, 1966, the conviction was affirmed. People v. Reeves, 64 Cal.2d 766, 51 Cal.Rptr. 691, 415 P.2d 35 (1966).

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3. Appellant was represented on appeal by Miss Mary Montgomery who also was one of appellant's attorneys in the proceedings below. The record of the state court appeal was introduced at the evidentiary hearing and consists of Exhibits 1 and 2.

The California Supreme Court fully considered the issue of whether appellant received the effective assistance of counsel. The court concluded, at page 774:

> "To justify relief on the ground of constitutionally inadequate representation of counsel, '"an extreme case must be disclosed' [Citations]. It must appear that counsel's lack of diligence or competence reduced the trial to a "farce or a sham." [Citations].' (People v. Ibarra, (1963) 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487].) Defendant has the burden, moreover, of establishing his allegation of inadequate representation 'not as a matter of speculation but as a demonstrable reality.' (Adams v. United States ex rel. McCann (1942) 317 U.S. 269, 281 [63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435]; accord, People v. Robillard (1960) supra, 55 Cal.2d 88, 97.)
>
> "Here defendant has failed to sustain that burden. There is no showing, for example of an 'unawareness of a rule of law basic to the case . . . that reasonable preparation would have revealed.' (People v. Ibarra (1963) supra, 60 Cal.2d 460, 466). Rather, the record discloses that Mr. Meeks was well aware of the tactical moves commonly made by counsel in the presence of strong inculpatory evidence against their clients, in the often fulfilled hope of impressing the trier of fact with their clients' candor, remorse, and willingness to cooperate. Defendant expressly concurred in every step thus taken, and he cannot now be heard to complain of the course followed merely because it proved unrewarding. Applicable here, by analogy, is the general rule that 'the right to counsel may not be used to subvert the orderly and efficient administration of justice' (People v. Douglas (1964) 61 Cal.2d 430, 435 [38 Cal.Rptr. 884, 392 P.2d 964], and cases cited.)"

Appellant filed a petition for a writ of certiorari, to review the above decision, in the United States Supreme Court. The petition was denied on November 14, 1966. Reeves v. California, 385 U.S. 952 (1966). A copy of the

petition was introduced at the evidentiary hearing as Exhibit 13.

C. State habeas corpus proceeding.

On August 11, 1966, appellant filed an application for a writ of habeas corpus in the California Supreme Court. The application was denied, without written opinion, on August 31, 1966. In re Reeves, Crim. No. 10305. On December 12, 1966, he filed another petition for a writ of habeas corpus which was denied by the California Supreme Court, without written opinion, on December 21, 1966. In re Reeves, Crim. No. 10683.

D. Habeas corpus proceedings in the District Court.

1. Proceedings on the order to show cause.

On March 7, 1967, appellant's petition for a writ of habeas corpus was filed in the District Court and an order to show cause was directed to appellee. Frederic Campagnoli, Esq., was appointed to represent appellant and continues to represent appellant in the instant appeal. Appellee filed a return to the order to show cause on March 10, 1967. The court heard argument on March 14, 17 and 20, during which time appellee lodged with the court the record on the state appeal and other documentation as requested by the court. On March 22 the court ordered an evidentiary hearing "to determine whether the said petitioner received adequate representation of counsel."

2. The evidentiary hearing.

An evidentiary hearing was conducted before the District Court on May 1, 1967 (H 1-243) 4/. Argument was heard by the court on the following day (H 244-266).

Appellant, upon examination by his appointed counsel, testified that he was 28 years old, had an eighth-grade education and since leaving school had spent most of his time in custody (H 6-7). His longest period of gainful employment was four months (H 7).

According to appellant, he had his first conference with Mr. Meeks on the day after Mr. Meeks was appointed, or April 3. 5/ (H 9-10). Mr. Meeks asked appellant to tell his story and appellant did so (H 11). Appellant testified that he told Mr. Meeks that he was getting gas at the oil lease when two men drove up and parked their cars near his (H 12). One of the men came over and questioned him and, after an exchange of words, called him a "son-of-a-bitch" (H 12). The man came at appellant with a club which he swung at him several times as appellant tried to jump into his car (H 12). Appellant pulled a gun from

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4. "H" is used to designate the reporter's transcript of the evidentiary hearing.

5. Appellant was probably confused about the date because he testified that Mr. Meeks at this conference told him that the judge had not yet made an appointment but had only requested Mr. Meeks to talk to him so that Mr. Meeks might decide if he would accept an appointment (H 10). Mr. Meeks, in fact, was appointed on April 2 (Exhibit 1, pp. 11; Exhibit 2, p. 5) (See also H 105).

the glove compartment, pointed it at the man and ordered him to throw the club away (H 12). He then had the man walk over to the other man and directed both to empty their pockets (H 12). According to appellant he wanted only their car keys and, when he didn't see any keys, he decided to run them off into the brush (H 12). One of the men started to walk the wrong way and appellant followed after him while the other man dropped behind (H 13). Appellant testified that he concluded his account to Mr. Meeks as follows (H 13):

> "[I] caught a glimpse out of the corner of my eye and I spun around. The deceased was leaping at me, bent over. He had something that he picked up off the ground. I don't know what it was. It looked like a pipe, maybe dirty pipe. When he came at me, I swung around and fired all in one motion and I took off running the other way.
>
> "I fired back over my shoulder as I was running. I run to my car and drove away."

Appellant testified that Mr. Meeks did not question him about his story and told him he didn't think it was first degree and would talk to the District Attorney (H 13-14). This was the only time he was able to relate the entire story to Mr. Meeks (H 29). On other occasions when Mr. Meeks asked him to go over the story they were interrupted by jail personnel (H 29). Appellant further testified that at this meeting, which lasted about twenty minutes and was held in the county jail, and at subsequent meetings, Mr. Meeks failed to inquire about his family and educational background (H 10, 13-14). However, they did discuss his criminal record and his employment (H 14).

Appellant gave testimony about a second meeting with Mr. Meeks in a holding cell just prior to the April 6 appearance in court. He claimed Mr. Meeks told him to plead guilty and get a life sentence (H 15). When appellant refused, Mr. Meeks asked for a continuance (H 15). The same thing occured at a third meeting in the holding cell on April 13 (H 15-16). Appellant asserted that Mr. Meeks told him that he felt the judge would give a life sentence (H 16). Mr. Meeks said the matter would have to be continued because he hadn't talked to the District Attorney (H 16).

Appellant said that he saw Mr. Meeks for the fourth time at the county jail about April 21 (H 17). They did not discuss the case but only a matter involving appellant's fiancee (H 16-17). He testified he saw Mr. Meeks again prior to the court appearance on April 28 (H 17). He claimed that Mr. Meeks urged him to plead guilty and that he again refused to do so (H 18). He saw Mr. Meeks in the jail in early May (H 18). Mr. Meeks, according to appellant, said that the judge told the District Attorney that the crime shouldn't be first degree and the death penalty shouldn't be sought (H 18-19). When appellant refused to plead guilty, Mr. Meeks then said they would try a plea of not guilty by reason of insanity and explained that such a plea would revert to a guilty plea if appellant were found sane (H 19). Mr. Meeks further explained that a psychiatrist would be appointed by the court (H 19). Appellant said he told Mr. Meeks "I wasn't crazy" and did not agree to such a plea (H 19). On

May 5, he talked to Mr. Meeks in the holding cell in the courthouse (H 19-20). Appellant testified that he again told Mr. Meeks he would not plead guilty or not guilty by reason of insanity (H 20-21). In court, moments later, he did plead not guilty by reason of insanity (H 20-21). The reason for this, appellant explained, was that "I felt hopeless", "I gave up", "Nobody would listen to me" (H 21).

Appellant stated that he never saw Mr. Meeks again until they met in the courtroom on May 27 (H 23). Mr. Meeks told him that he had read the psychiatrist's report but did not discuss a stipulation to submit the sanity issue on the report (H 23). Appellant said he never saw the report (H 23-24).

He talked to Mr. Meeks on June 11 and Mr. Meeks told him that he didn't want Pugh, the survivor, to take the stand (H 24-25). Mr. Meeks said that appellant's story would not be believed considering appellant's criminal record (H 25). He did not discuss the possibility of appellant taking the stand or any stipulation respecting the degree of the crime, the prior criminal record and the grand jury testimony of Pugh (H 25-26). Appellant testified he never saw or discussed Pugh's grand jury testimony and that he never talked about strategy or pleas with Mr. Meeks (H 27).

On June 23, according to appellant, he expected a hearing on degree and penalty and was unaware that Mr. Meeks was prepared to stipulate concerning these matters (H 27-28). He conferred with Mr. Meeks in jail prior to sentencing and in

the holding cell on the day of sentencing, June 30 (H 30-31). On the latter occasion, before going into court, Mr. Meeks told him that whatever happened didn't matter because "the case would never hold up in the higher courts anyway" (H 31).

Appellant testified that Mr. Meeks never discussed with him any investigation, any possible witnesses, the advisability of a jury or non-jury trial, any conversations with the District Attorney, or the possibility of a death penalty (H 32-34).

Upon examination by counsel for appellee, appellant admitted that he had been convicted of five prior felonies and that in each case he had pled guilty (H 36-41; Exhibits 5-9). When asked if he received adequate representation from his attorneys in these cases, he replied, in each instance, that they "told me to plead guilty and I pled guilty" (H 37-41). He further admitted that he had not prepared the petition for a writ of habeas corpus but that it had been prepared by a fellow inmate (H 41-42, 59).

Appellant said he knew the gun was loaded when he fired at Parsons from about 10 to 12 feet (H 43, 45). He fired five times but didn't know if he hit Parsons (H 45-46, 54). Appellant was unable to explain the discrepency between his testimony that Parsons had a weapon prior to the shooting and his statement to the prison psychiatrist which made no reference to such a weapon (H 48-49; Exhibit 10). He stated he did not see Parsons pick up the weapon, though earlier he had testified that it had

been picked up off the ground (H 13, 51).

Appellant related that he had talked to Mr. Meeks a couple of times about "pleading not guilty and self-defense" but that he was ignored (H 51). He admitted discussing pleas on several occasions although previously he had testified that these matters were not discussed (H 27, 52).

After shooting at Parsons, appellant said he ran (H 54). He never went back to see if Parsons had been hit and never called the authorities to report his claim that Parsons had attacked first (H 54-56). He did not tell Pugh that Parsons had attacked him at the car but instead marched both men off under gun point (H 56-57). He denied taking Pugh's wallet (H 58-59):

> "Q. Suppose you knew the prosecution had evidence -- had in fact located the wallet not at the scene of the crime but at some distance from the scene of the crime. Would you then have been willing to testify in Superior Court that you did not take the wallet?
>
> "A. Yes, sir."

Appellant conceded that in open court he freely and voluntarily concurred in the actions of Mr. Meeks, but reiterated his claim that he had given up and had decided merely to agree (H 62-67, 69, 73, 77).

At the evidentiary hearing, Mr. Meeks was examined first by counsel for appellant (H 89). Mr. Meeks testified that he commenced the practice of law in California in 1947 (H 90). He served in the Kern County District Attorney's Office from

1947 until 1954 handling criminal prosecutions including homicides (H 90-91). Since then he had been in the private practice of law with offices in Bakersfield (H 91-92). During this period he had represented about 500 indigent defendants in misdemeanor and felony cases (H 97). 6/ In March 1965 he was contacted by the Clerk and by Judge Steele of the Superior Court and asked if he would accept an appointment to represent appellant (H 92-94, 100).

Mr. Meeks then talked to Mr. Nelson, the District Attorney, and reviewed the prosecution's evidence (H 112-114). 7/ Mr. Meeks recalled conferring with appellant for some three hours on April 5 (H 105). He believed he had seen appellant at an earlier time but couldn't recall the date (H 105). At this conference he asked appellant to relate what transpired in the transaction (H 106-107). Appellant told him that he was getting gasoline when two men drove up, asked him what he was doing and then began berating him. Appellant told Mr. Meeks that he thought the men might jump him so he got his gun (H 108). He had the men empty their pockets and started them walking toward the tanks (H 108). The men drifted apart and appellant ordered them

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6. Kern County does not have a Public Defender (H 92).

7. This conference with the District Attorney is supported by Mr. Meeks statement in court on April 6: "Mr. Nelson seems to be out of town on business and I would like to talk to him some more, that is, talk to him regarding this matter" (Exhibit 1, p.3). See also the testimony on Mr. Nelson (H 211).

to get back together (H 108). Appellant thought the men might jump him and he shot one of the men (H 108-110). Appellant did not tell him that the man made a move toward him (H 109). Mr. Meeks went over the story with appellant but still could not "figure out why he fired the shot" (H 109).

After the conference Mr. Meeks went to the homicide detail of the Sheriff's office, heard its account of the evidence, and reviewed reports and photographs of the scene and appellant's criminal record (H 110-111, 125, 145). He talked to the men who were working on the case and to appellant's girl friend (H 111, 118, 145). He also reviewed the grand jury transcript (H 115, 126). He formed the opinion that the evidence against his client was of "an inflammatory nature" (H 116).

Mr. Meeks appeared in court with appellant on April 13 and April 28 and on these occasions they also conferred (H 119, 123). On May 4, the day before the plea was entered, they conferred for two hours in the county jail (H 119). Appellant's background and education were discussed (H 127). Mr. Meeks explained "in detail and thoroughly" the various possible pleas (H 122). Appellant told him to do what he thought best (H 123). Mr. Meeks testifed (H 125):

> "A. And I explained to him that the evidence wasn't good, it wasn't favorable. In my mind I had thought there might have been a possibility through psychiatric examination to detect some breakdown in his behavior, that he could have been momentarily insane, temporarily insane or whatever the psychiatriast --
>
> "Q. Go ahead. Have you concluded?

"A. Yes.

"Q. You appreciated the fact that by entering this plea of not guilty by reason of insanity, if he were found sane he automatically had pleaded guilty to the charge.

"A. That is correct, and I so informed him and the record will so reflect."

On May 5 they saw each other in the holding cell prior to entry of plea and appellant voiced no objection to a plea of not guilty by reason of insanity (H 127). Mr. Meeks advised his client that he would be examined by psychiatrists and told appellant: "'You tell them everything that transpired just like you have told it to me'" (H 138). Mr. Meeks wanted to get appellant's story before the judge through the doctors' reports (H 138).

Thereafter Mr. Meeks discussed appellant's case on the telephone with Dr. Matychowiak and Dr. Feinstein, two of the appointed alienists (H 130-131). On May 27, prior to the court hearing on the question of sanity, Mr. Meeks reviewed the doctor's reports with appellant (H 129-130). It was decided to submit the issue on the reports because Mr. Meeks "didn't think anything more could be developed than appeared in the reports" (H 131). After reviewing all the evidence and after many conferences with appellant, Mr. Meeks concluded, and so advised his client, "'the best thing we can do in the case under the circumstances is to enter a plea and throw yourself on the mercy of the Court'" (H 129, 135).

Mr. Meeks conferred further with the District Attorney on June 8 and with Appellant on June 9 (H 135-136). It was then

decided that appellant would not testify, that the degree of the killing was first degree, and that the issue of penalty be submitted on the grand jury transcript and the record of convictions (H 140-141, 144). Mr. Meeks' purpose was to preclude the District Attorney from "augmentation and accentuation" of the record in what he believed was an inflammatory case (H 140-142, 148). Mr. Meeks testified (H 141):

> "I was endeavoring to avoid our District Attorney accentuating or adding any more fuel to the fire than necessary because of my pattern of approach on this thing, and I advised Mr. Reeves to enter this plea and throw himself on the mercy of the Court in hopes that the Court would pass judgment of life in prison."

On examination by counsel for respondent, Mr. Meeks testified that his investigation of the case included a visit to the scene of the killing (H 154, 161). He then identified a series of official police reports and testified that he had reviewed and considered the contents of the reports during the course of his investigation prior to plea (H 155-162; Exhibits 15, 16, 17, 18, 19, 21, 22). The limitations on the size of this brief prevents a summary of the contents of these reports. However, by reviewing the reports, Mr. Meeks became aware of the overwhelming evidence which the prosecution had and was prepared to use. Mr. Meeks also identified certain physical evidence and photographs in the possession of the prosecution (H 162-166; Exhibits 23-A through 23-P, 24, 25).

Mr. Meeks compared appellant's story of the killing with the evidence in the hands of the prosecution (H 167-168).

He considered the impact of appellant's story, in the context of the prosecution's evidence, upon a jury and upon the trial judge (H 168, 170). He considered the fact that an experienced District Attorney would be trying the case (H 169). Another factor was that the trial judge, to the knowledge of Mr. Meeks, had never imposed the death penalty (H 170). Mr. Meeks was further concerned about the prosecution developing conflicts among appellant's statements to the psychiatrists (H 173). Moreover, Mr. Meeks was of the opinion that appellant would be a poor witness in his own behalf (H 174-175). With respect to the record of prior convictions, Mr. Meeks knew that the District Attorney could bring in evidence of the convictions whether or not there were a stipulation (H 177-178). Consequently, Mr. Meeks pursued a strategy of getting the prosecution to enter into certain stipulations which he hoped would foreclose the District Attorney's case (H 180):

> "MR. MURPHY: Q. Mr. Meeks, when you received this stipulation -- when you had the agreement to the stipulation from the District Attorney, as a defense attorney how did you value this stipulation?
>
> "A. Well, I felt that it shut the District Attorney off from bringing in all the necessary evidence that he might see fit to bring in on the issue of the penalty and on cross-examination, and so forth.
>
> "I wanted to have the record go to the Court as free as possible of any augmented comment by witnesses or Mr. Nelson, the District Attorney.
>
> "Q. Then as I understand your trial strategy, this stipulation fit within that strategy to show your cooperation with the trial court and also to limit what the trial court knew about the crime and knew about the defendant.

"A. That is correct.

"Q. Mr. Meeks, you testified that if you were to try this case again you would follow the same approach, is that right?

"A. I would."

Mr. Meeks denied that he had ever promised appellant that he would get life imprisonment or that he told appellant that the trial judge would give a life sentence (H 181-182). He denied ever threatening or coercing appellant (H 182). He testified that appellant was at all times cooperative with him, appeared to comprehend the advice given and expressed no dissatisfaction with the actions of counsel (H 183-184). Appellant never requested to take the stand (H 183).

Mr. Nelson, the District Attorney of Kern County, also testified at the evidentiary hearing (H 210). Mr. Nelson recalled first talking to Mr. Meeks soon after the grand jury indictment came down (H 211). The prosecution's file was made available to Mr. Meeks and the evidence was discussed in detail (H 212-213, 215). Thereafter, on several occasions, Mr. Meeks approached him on the possibility of getting a lesser penalty (H 213-214). Mr. Nelson advised him that he would seek the death penalty (H 214).

Mr. Meeks related appellant's story to Mr. Nelson who advised Mr. Meeks that no club or stick was found at the scene, that Parson's wallet and an oil can with gasoline from the lease were found a considerable distance away, that appellant had told conflicting stories of the events to certain prosecution witnesses, that appellant had been connected with the murder

weapon, that the bullet which killed Parsons matched bullets found where appellant previously did some target shooting, and that Pugh was an excellent witness (H 215-223, 231-232). Mr. Nelson testified (H 223):

> "MR. MURPHY: Q. The important thing as far as this proceeding goes, Mr. Nelson, is whether or not you acquainted Mr. Meeks during the course of the proceedings with all this evidence.
>
> A. Yes.
>
> Q. Which you had.
>
> A. Yes. Step by step I went through and showed that the testimony of the witness, Mr. Pugh was verified at the scene by the physical evidence and that the story he told by the defendant at the scene was not only verified, but the evidence was to the contrary and couldn't have been. We couldn't find one physical evidence item that would verify any type of attack by the deceased or Mr. Pugh."

Mr. Nelson further testified that the prosecution intended to present all its evidence and to bring in the witnesses involved in the prior offenses, which evidence he believed would be "very effective" (H 224, 230- 232). He initially refused to stipulate with Mr. Meeks to limit the evidence on degree and penalty because he "wished to present [the] entire case" (H 224). Later he changed his mind because he believed the court's decision would turn on the question of rehabilitation (H 225).

The matter was submitted to the District Court after argument held on May 2 (H 244-266).

APPELLANT'S SPECIFICATION OF ERROR

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

SUMMARY OF APPELLEE'S ARGUMENT

THE EVIDENCE BEFORE THE DISTRICT COURT IS SUFFICIENT TO SUPPORT THE FINDINGS THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE FROM HIS COURT-APPOINTED ATTORNEY AND THAT APPELLANT KNOWINGLY AND UNDERSTANDABLY CONCURRED IN THE ACTIONS OF HIS ATTORNEY.

ARGUMENT

APPELLANT RECEIVED EFFECTIVE ASSISTANCE FROM HIS COURT-APPOINTED ATTORNEY AND KNOWINGLY AND UNDERSTANDABLY CONCURRED IN THE ACTIONS OF HIS ATTORNEY.

Appellant was entitled to the effective assistance of counsel at all critical stages of the criminal proceedings against him. Powell v. Alabama, 287 U.S. 45, 66-71 (1932); White v. Maryland, 373 U.S. 59, 60 (1963); Wilson v. Rose, 366 F.2d 611, 614 (9th Cir. 1966); People v. Sarazzawski, 27 Cal.2d 7, 17, 161 P.2d 934 (1945). We, of course, have no dispute with the many cases cited by appellant which reiterate this proposition of constitutional law.

The District Court, after a complete evidentiary hearing on this question, concluded that appellant received constitutionally adequate representation from Mr. Meeks, his attorney. It is only necessary on this appeal to examine the evidence to determine if this finding is supported by the evidence. Such finding must stand unless clearly erroneous. Barber v. Gladden,

327 F.2d 101, 104 (9th Cir. 1964), cert. denied 377 U.S. 971 (1964).

1. Mr. Meeks was a qualified and experienced attorney.

Mr. Meeks had practiced law in Kern County, California, since 1947, and was familiar with the community (H 89-90, 168-169). He served in the District Attorney's office for seven years where he prosecuted murder cases along with other felony matters (H 90-91). Subsequently, as a private practitioner, he had handled over 500 misdemeanor and felony matters (H 96-97). He knew the District Attorney and his staff and had known the trial judge for twenty-five years (H 94-96, 169-170, 208). He considered accepting the appointment to represent appellant at the request of the trial judge and the clerk of the court (H 91-93).

2. Mr. Meeks thoroughly investigated the case.

Mr. Meeks' conduct in preliminary investigation and criminal discovery provides a textbook example of what a defense attorney should do. A list of the steps he took to acquaint himself with the case and to evaluate the evidence would include the following significant items:

a. At the Sheriff's Office he talked to the men who were assigned the case, many whom he knew personally (H 110, 120, 145, 152, 166, 204). He studied reports, photographs and the physical evidence (H 111, 120, 145-146, 152, 154, 161-166, 204; Exhibits 15-22, 23a-23p, 24-27).

b. He talked to the District Attorney on many occasions

and reviewed the case with him and his deputies (H 111-114, 120, 145-146, 169). He examined the prosecution's file (H 112, 114, 161-166). He and the District Attorney bargained on the question of possible punishment (H 120, 145, 176, 181-182, 211-216, 218-225).

c. He visited the scene of the crime (H 161).

d. He reviewed the grand jury transcript (H 115, 126).

e. He interviewed appellant's girl friend as a possible witness and talked to someone in appellant's family (H 116-119, 127-128).

f. He studied appellant's prior criminal record (H 125).

g. He talked to the court-appointed doctors prior to their reports being filed (H 130-131).

3. Mr. Meeks and appellant conferred, reviewed the evidence, discussed the law and considered tactics.

Mr. Meeks conferred with appellant on numerous occasions both in the county jail and in the courthouse prior to hearing dates (H 105-110, 113, 119, 120-123, 129, 131). Before plea they thoroughly went over appellant's version of the killing (H 105-110, 114-115, 167). Mr. Meeks told appellant that the prosecution's evidence was inflammatory and adverse, and that if the case went to a jury the death penalty would probably be imposed (H 120, 168). They considered the impact of appellant's story upon a jury or a trial judge (H 168). Mr. Meeks explained in detail the different pleas available and their consequences (H 121-123, 125, 137, 171). Appellant's prior

criminal record was discussed as well as his background and education level (H 127, 198). The possibility that appellant was insane was considered by Mr. Meeks and Mr. Meeks advised a plea of not guilty by reason of insanity (H 121-122, 128, 134-135). Appellant told Mr. Meeks to do what he thought best (H 121, 135).

Appellant at all times appeared to comprehend Mr. Meeks' advice (H 135, 174, 176-177, 183). Mr. Meeks told him that doctors would be appointed to examine him (H 183-184, Exhibit 1, p. 9). Mr. Meeks believed that through the psychiatric reports he could get appellant's story before the trial court without submitting him to cross-examination (H 137-138, 169, 173). He advised appellant to tell the story to the doctors (H 138, 172).

After the plea, Mr. Meeks advised appellant of the results of the doctors' examinations (H 129-130). They reviewed the evidence respecting the degree of the crime (H 134-135). A stipulation that the murder was first degree was discussed (H 144). Appellant again told Mr. Meeks to do what he thought best (H 144).

At no time during these numerous conferences did appellant ever object to any action taken by Mr. Meeks (H 183). At no time did appellant ever request to testify (H 183). Mr. Meeks made no promises to mislead appellant about the possible punishment (H 180-181, 205). Mr. Meeks used no threats or coercive tactics (H 182).

4. Mr. Meeks was fully informed on law and procedure.

A review of the record discloses that Mr. Meeks was fully informed on law and procedure. Appellant does not allege

any legal errors in the defense of appellant. We have found none. Compare Wilson v. Rose, 366 F. 2d 611, 614 (9th Cir. 1966).

5. Mr. Meeks' judgment was considered and informed.

Mr. Meeks decision, concurred in by appellant was as follows (H 152):

> "The evidence, as it appeared to me, was not only inflammatory, it was very adverse to this man and I felt in my considered opinion the best thing to do under the circumstances was to plead guilty, throw him on the mercy of the Court and hope that we get a life sentence."

Mr. Meeks' strategy was to cooperate with the court and at the same time prevent inflammatory details concerning the crime and appellant from reaching the court except in "a purely documentary form" (H 152-153, 201-209).

This was not an uninformed decision. This decision was made by an experienced attorney thoroughly familiar with the facts of the case. This was not a hasty decision. It was arrived at only after many conferences with appellant over a period of one month. Yet it is this decision, a matter of informed legal judgment, with which appellant takes issue.

Appellant first contends that his conferences with Mr. Meeks were not long enough (Br. p. 10-11). However, he doesn't suggest how long they should have been and if they had been longer what more might have been accomplished. The record shows that they conferred prior to plea for three hours on April 5 and two hours on May 4, in addition to numerous other conferences of unreported duration on other dates (H 105, 119).

Certainly, the effectiveness of counsel is not to be measured by the hours, minutes and seconds the attorney spends with his client. See Allen v. Wilson, 365 F.2d 881, 883 (9th Cir. 1966); Joseph v. United States, 321 F.2d 710, 712-713 (9th Cir. 1963), cert. denied 375 U.S. 977 (1964).

Appellant contends that they had no prior discussions about the psychiatric examinations, or about his background, medical history and family (Br., pp. 10-11). He is mistaken. Mr. Meeks discussed the pending examinations with appellant and specifically advised him to tell the doctors his story (H 138, 172). Appellant's background and educational level were discussed not only with appellant but apparently with someone in the family (H 127, 198). He telephoned and talked to two of the doctors before their reports were submitted (H 130-131). Appellant asserts that Mr. Meeks was not present during these examinations. Assuming this to be the fact, he does not suggest what Mr. Meeks might have accomplished by his presence. Appellant's background, of course, was brought before the court through the psychiatric reports (Exhibit 2, pp. 11-18).

Appellant concludes that it was error in judgment for Mr. Meeks to submit the issue of penalty on the grand jury transcript, the record of prior convictions and argument (Br. p. 12-13). As the record indicates the District Attorney could have put on, and intended to put on, all the evidence of guilt and all the evidence and detail of appellant's past crimes at the penalty phase (H 224-226, 230-232). Mr. Meeks was aware of this

and this is precisely what he wanted to avoid (H 177-180). A "cold" record may sometimes be better than a "hot" record.

Mr. Meeks did not want appellant to take the stand at the penalty phase because there was too much to lose. Appellant was not an articulate witness and the District Attorney was a formidable cross-examiner (H 169, 174-175, 205). The District Attorney would then open his case and there would be a direct confrontation between Pugh's version and appellant's version of the killing. Pugh was reportedly a good witness (H 231-232). Mr. Meeks had evaluated the impact of appellant's story against the prosecution's evidence (H 168). He knew this evidence was adverse and inflammatory (H 168). Appellant's version did not jibe with the physical evidence, e.g., no club was found at the scene and the victim's wallet had been taken (H 215, 219-220, 223). The District Attorney had confessions and admissions which appellant had made to certain witnesses (H 218-219). Under such circumstances Mr. Meeks exercised good judgment in not calling appellant to the stand, assuming appellant would have testified.

Appellant argues that nothing was offered in mitigation of penalty. He does not, however, indicate what might have been offered.

Appellant's version of the events did get before the court in the doctors' reports and in Mr. Meeks' argument. This is what Mr. Meeks intended. He did not want appellant to take the stand and be destroyed. The strategy of seeking mercy is for

counsel to emphasize the defendant's contrition and his willingness to cooperate, by offering and entering into such waivers and stipulations as will expedite the disposition of the case.

Appellant had the burden before the District Court of establishing his allegation of inadequate representation "not as a matter of speculation but as a demonstrable reality" Adams v. United States, 317 U.S. 269, 281 (1942). He failed to do so. Consequently, the finding of the District Court as supported by the evidence of record must be affirmed.

The testimony of Mr. Meeks at the evidentiary hearing is manifestly consistent with the trial record which discloses that appellant expressly in open court concurred in each and every stipulation made.

The trial record discloses that appellant and his attorney conferred on several occasions prior to plea (Exhibit 1, pp. 3-6). The record of the May 5 arraignment indicates that appellant had been advised by Mr. Meeks and understood that in the event he were found sane, his plea of not guilty by reason of insanity would become in effect a plea of guilty (Exhibit 1, pp. 7-11).

Appellant expressly concurred in every step taken by Mr. Meeks, and he cannot now complain of the course followed merely because it proved unsuccessful (Exhibit 1, pp. 12-42).

CONCLUSION

For the foregoing reasons we respectfully submit that order of the District Court should be affirmed.

DATED: December 11, 1967.

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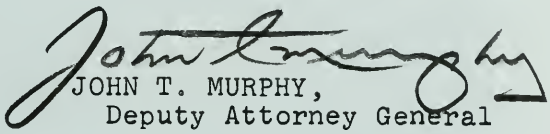

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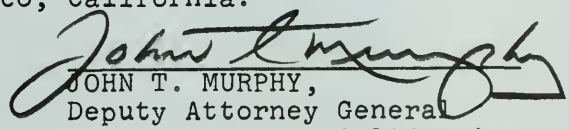
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: December 11, 1967.
San Francisco, California.



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